No. 672

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN P. KING,

Respondent.

On Writ of Certiorari to the
United States Court of Claims

BRIEF FOR THE LINER COUNCIL, AMERICAN INSTITUTE OF MERCHANT SHIPPING, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MISCELLANEOUS

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INTEREST OF AMICUS CURIAE

In January 1969 the American Institute of Merchant Shipping succeeded to the functions of several organizations. Among these was the Committee of American Steamship Lines, which had been composed of thirteen of the fourteen companies parties to operating-differential subsidy contracts with the United States under the Merchant Marine Act, 1936, 49 Stat. 1985, as amended, 46 U.S.C. § 1101 *et*

seq. The concern of the American Institute of Merchant Shipping relating to that subsidy program is under the jurisdiction of its Liner Council, a semi-automonous component which is *amicus curiae* here.

For more than 30 years the bulk of the American liner fleet has been operated under the Merchant Marine Act, 1936. As the U.S.-flag lines must employ American seamen, they are paid under Title VI of that act an operating-differential subsidy designed to equalize their wage costs with those of their principal foreign competitors. As the U.S.-flag lines must build their vessels in American shipyards, the shipyard under Title V of the Act is paid a construction-differential subsidy designed to equalize the cost to the owner as compared to construction abroad.

The Merchant Marine Act uses as its basic operating instrument contracts between the United States and the ship operators and shipbuilders. Through these contracts, and the attendant regulations and instructions of the Maritime Administration,[1] the subsidized line is closely supervised as to every aspect of vessel operation and maintenance, sailing schedules and rates, vessel lay-ups, operation of unsubsidized vessels, and every detail of its financial transactions.

A very considerable proportion of the disputes which inevitably arise out of this maze of regulation and control relate to the obligations of the operator or of the United States under the operating-differential subsidy contract. Such disputes are apparently subject to review only in the Court of Claims. *American President Lines, Ltd. v. Federal Maritime Board,* 133 F. Supp. 100 (D.C.D.C. 1955), *aff'd* 235 F.2d 18 (D.C. Cir. 1956).[2] That review as to many

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[1] The administration of the subsidy program is currently the responsibility of the Secretary of Commerce, who acts through the Maritime Administration and the Maritime Subsidy Board. Reorganization Plan No. 7 of 1961, 75 Stat. 840; Department of Commerce Order No. 117-A, 31 Fed. Reg. 8087.

[2] The decision in *American Mail Line v. Gulick,* CADC 22,091 (1969), slip p. 15, assumes that such a controversy could be brought

claims cannot ordinarily be accomplished within a reasonable period of time, so long as the plaintiff must have in hand a fully matured claim for a money judgment. This is because of the procedures governing subsidy payments.

Decisions and orders of the Maritime Administration may be entered during the year of operation or a number of years later. In either case they to not readily translate into money claims until accounts have been struck for the year. The statute, with innocent optimism, provides that "The amount of such subsidy shall be determined and payable on the basis of a final accounting made as soon as practicable after the end of each year * * *." §603(a), 1936 Act, 46 U.S.C. §1173. The "final accounting" for the year can be completed only after all subsidy rates have been established. 46 C.F.R. §286.5(c) and (d). Before subsidy rates can be established there must under current procedures be a meticulous statistical determination of the principal foreign flag competition upon each route and then a painstaking investigation of the wage and other costs of those principal foreign operators. Pike & Fischer, Shipping Regulation, par. 186. The American costs are readily ascertainable but there is often protracted inquiry into whether one or another may be allowable for subsidy purposes. After the rates are established the annual "final accounting" must be prepared by the operator and minutely audited by the Maritime Administration. Only then can a voucher for annual subsidy be submitted. See, generally, Accounting Instruction No. 29, Pike & Fischer, Shipping Regulations, par. 510:29.

The necessity of awaiting completion of the annual final accounting before the operator can have a fully matured money claim in hand can involve delays of prodigious proportions. It can take many years before all the substantive issues relating to a given year of operations have been

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to that court. As the issue was neither argued nor briefed, we doubt that it overrules *American President Lines*.

decided.[3] That decision must be followed by the annual accounting and audit, each of breath-taking complexity, and the preparation and payment of the final voucher for the year.

The annual "final accounting" for many lines is not, however, by any means "final." The Merchant Marine Act provides for "recapture" of subsidy to the extent of 50 percent of earnings over 10 percent of "capital necessarily employed," based upon a cumulative 10-year period. § 605(5), 46 U.S.C. § 1176. Estimated accrued recapture, if any, is deducted from the annual payments. Accounting Instruction No. 29, *op. cit. supra.* In addition to this automatic reservation for future adjustments, each party may under the contract reserve from the final accounting other disputes. Art. II-24. The truly "final" accounting is not undertaken until completion of the ten-year recapture period, and only then can a really final voucher be submitted. The 10-year accounting and audit is itself a very slow procedure. *American President Lines, Ltd. v. United States,* 154 Ct. Cl. 695, 291 F.2d 931 (1961) and *Oceanic Steamship Co. v. United States,* 165 Ct. Cl. 217 (1964) each involved suits where the money claim accrued 10 years after the close of the recapture period.

It is only the rare dispute which can within several years progress to the point that the subsidized operator has in fact been denied a cash payment to which he feels entitled under his contract. Delays of a decade and more are not

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[3]Random illustrations may be drawn from the reports open to judicial notice. *American Mail Line, et al. - Manning Scales, C-4 Vessels,* 10 P&F SRR 678 (Nov. 18, 1968), review by Secretary pending, disallowed subsidy on certain positions effective May 23, 1961. *American Mail Line, et al. - ODS Rates (1962-1963),* 10 P&F SRR 711 (Nov. 22, 1968), review by Secretary denied Dec. 27, 1968, involved subsidy rates applicable almost 7 years before. *Collective Bargaining Agreement - Seamen's Medical Center,* 10 P&F SRR 765, and *Collective Bargaining Agreement, MSO Industry Termination Fund,* 10 P&F SRR 760, each decided Dec. 19, 1968, review by Secretary pending, each involve payments for 1961 and subsequent years.

unusual. Many of these disputes affect the actual vessel operations of the subsidized lines. Many others involve very large amounts of money, the uncertainty of which adversely affects the financial planning of the lines. In either case sustained delay in settling the issues under the contract is highly disadvantageous to the subsidized operator. We should suppose it also disadvantageous to the Government to have ancient disputes unsettled. Apart from its general interest in certainty of its obligations, and apart from the general responsibility of the Government to its citizens, the Maritime Administration is committed by the Congress to the development of an adequate merchant marine and that objective is surely not advanced by a lag of years or decades before fundamental issues with the operators can be settled.

The Liner Council of the American Institute of Merchant Shipping and its member lines have accordingly a major interest in the availability of declaratory relief in the Court of Claims. Its availability could often reduce the pre-suit waiting period by 5-10 years. The predecessor organization of *amicus curiae* filed a brief and presented oral argument as *amicus curiae* in the Court below. That Court was kind enough to note that this had been helpful [App. 14]. It is possible that an additional brief may aid this Court in its consideration and decision of the case. We accordingly file this brief as *amicus curiae* in support of the decision below. We file concurrently herewith the consent of both parties to this case to such a filing.

OPINION BELOW - JURISDICTION - STATEMENT

These, so far as concerns the interest of *amicus curiae*, are satisfactorily stated in the brief for the petitioner (pp. 1-2, 3-5). It is necessary, however, to restate the "question presented" and the "statutes involved."

QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. § 2201, empowers the Court of Claims to give declaratory relief in cases within its subject-matter jurisdiction.

STATUTES INVOLVED

28 U.S.C. §451. *Definitions*

As used in this title:

> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> § 1491. Claims against the United States generally. * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * *

The Declaratory Judgment Act, 28 U.S.C. 2201, provides in pertinent part:

> §2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court

of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

SUMMARY OF ARGUMENT

The basic difference between the Solicitor General and *amicus curiae* comes down to a single word: whether the Declaratory Judgment Act is inapplicable to the Court of Claims because its jurisdiction is limited to "claims for the *present* recovery of money from the United States." If as we show below the Tucker Act jurisdiction includes monetary claims whether or not immediate payment can be demanded, the Declaratory Judgment Act is applicable by its terms and by its reasons to such monetary claims in the Court of Claims.

I

A. We agree that the Declaratory Judgment Act does not expand the jurisdiction of any court, but simply supplies a new remedy for jurisdiction otherwise conferred. *Skelly Oil Co. v. Phillips Petroleum Co.*, 399 U.S. 669 (1950).

B. The Declaratory Judgment Act in 1934 was made applicable to the "courts of the United States." At that time the Court of Claims had recently been held to be a legislative not a constitutional court. *Ex parte Bakelite*, 279 U.S. 438 (1929); *Williams v. United States*, 289 U.S. 533 (1933). *Bakelite* explicitly recognized that the Court of Claims was nonetheless a "Court of the United States." 279 U.S. at 453. In any event, *Bakelite* and *Williams* have by the Congress in 1953 and this Court in *Glidden Company v. Zdanok*, 370 U.S. 330 (1962) been declared to have been wrongly decided.

If any doubt could be imported into the 1934 Act, none can remain after the 1948 codification, which in terms made the Declaratory Judgment Act applicable to "any court of the United States" and defined "court of the United States" to include the Court of Claims. 28 U.S.C. §§ 451, 2201.

C. In the course of enacting the Declaratory Judgment Act the Congress was on a number of occasions advised that it would apply to the "federal courts" and would cover disputes between the government and its citizens; the analogy between a declaratory judgment and the Court of Claims judgment, which could not be executed, was several times drawn. The 1935 exception of disputes "with respect to taxes" at least suggests that the Declaratory Judgment Act applied under the Tucker Act. The Congress seems never to have been advised of the Court of Claims 1935 decision rejecting declaratory relief, but last spring the Senate Committee on the Judiciary cited with approval the Court of Claims decision in the present case. S. Rpt. No. 1465, 90th Cong., 2d Sess., p. 3.

II

A. The Government's whole argument is based upon the premise that the Tucker Act, in conferring jurisdiction over "any claim against the United States," really means only a claim for the *present* payment of money. The statute does not so provide. The private bill business of the Congress, which the Court was designed to relieve, was not so confined. And a broadly contemporaneous statute, authorizing an unmistakable declaratory judgment to settle disbursers' accounts, used the precise word "claim" to ground that jurisdiction.

B. The Solicitor General's argument derives not from the statute but from a short-hand phrase developed and correctly used in wholly different contexts. He relies upon an incomplete quotation from *Glidden*: "From the beginning

it has been given jurisdiction only to award damages, *not specific relief,*" (370 U.S. at 557), but omits the italicized words. From *United States v. Alire*, 6 Wall. 573 (1867) and *United States v. Jones*, 131 U.S. 1 (1889) onwards, it has been understood that the Court of Claims was without jurisdiction to render specific, coercive relief against a Government official. It has *not* been understood that it had no power to dispose of a monetary claim until the plaintiff could count up the exact number of dollars then due him.

C. The settled practice of the Court of Claims is almost exclusively that of rendering declaratory relief. Its "money judgments" cannot be executed, but only declared. These judgments are spent on the date of entry, but have a binding declaratory force as to the future. Rule 47(c), pursuant to which liability is determined while damages if any are reserved, provides what is a declaratory judgment and nothing else. No court could have a more congenial reception of the Declaratory Judgment Act than that of the Court of Claims.

III

A. It is true that the Court of Claims in *Twin Cities Properties v. United States*, 81 C.Cls. 635 (1935), held the Declaratory Judgment Act inapplicable. This was done in two cursory paragraphs, and the reasoning was based upon the misapprehension that the Declaratory Judgment Act broadened the jurisdiction of the courts to which it was applicable. That decision, until the present case, has been generally assumed to be correct, and a few actual decisions have followed it, but *no* court has ever given the issue careful consideration. When *Twin Cities* was subjected below to a careful and exhaustive examination, it was overruled by an unanimous court.

B. Declaratory relief is available in all other forms of suit against the Government official, the results of which are also *res judicata* against the United States in the Court of Claims. The lower federal courts have held it applicable

under the Suits in Admiralty Act, the Tort Claims Act, and the NSLI Act, each of which arise under similar grants of jurisdiction, as well as under the broad grant of the Trading With the Enemy Act.

IV

There can be no valid ground of policy which would forbid that monetary claims against the United States be litigated while they are fresh, and require instead that they await instead the sometimes slow maturing of a claim for a defined number of dollars. The Court of Claims was, in truth, created for the very purpose of affording speedy justice.

When one looks to the facts of the *Twin Cities* case he finds that declaratory relief may, indeed, be as advantageous to the Government as to the Court of Claims plaintiff. The cost to the Government in having persuaded the court against anticipatory declaratory relief was four years of litigation, two subsequent decisions of the Court of Claims, and about $6,000,000 in double rent for eight years which might have been avoided had the rights of the parties been declared before the Government cancelled its lease.

V

Amicus curiae urges that it be left to the court below to determine whether respondent's claim is in fact a monetary claim upon which declaratory relief can be awarded. The issue is complex and difficult, is of no general importance, and is not presented to this Court by the petition for writ of certiorari.

ARGUMENT

The issue between the petitioner and *amicus curiae* comes down to a single word. The Government's basic argument as we read it runs: (a) The Declaratory Judgment Act does not expand the jurisdiction of the Court of Claims. (b) That jurisdiction is limited, by statute and by tradition, to "claims for the *present* recovery of money from the United States." (c) The Court is therefore without power to declare rights other than the amounts of money presently due the plaintiff.

If the word "present" were eliminated from the Government's analysis, there would remain no discernible difference between the Solicitor General and *amicus curiae.* We agree that the Declaratory Judgment Act does not expand the subject-matter jurisdiction of any court. We agree that the Tucker Act limits the jurisdiction of the Court of Claims and the district courts to monetary claims against the United States.[4] We differ only in respect to the Government's effort to convert the jurisdiction granted by 28 U.S.C. § 1491 from "any claim" into "any claim for the present recovery of money."

This is an exceedingly narrow area of controversy. Its resolution requires, however, a journey of some length. We show below that (i) the Declaratory Judgment Act must be read, as it is written, to extend this remedy to all courts of

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[4] The opinion below on occasion uses somewhat imprecise short-hand formulae: "controversies with a money cast," "money-related," "money-oriented" [App. 30, 31, 32]. But when it explains these short-hand formulae, it makes it wholly clear that they refer to cases where "the United States owes or will owe him money on account of some contract or provision of law" [App. 30], where the plaintiff asks relief "in order to be in a position to collect money from the United States, sometime in the future." [id.]. We prefer the short-hand "monetary claim," once used in the opinion below [App. 31] but do not consider that the Court below intended to cover into its jurisdiction any claim that would not at some point of time produce a defined money claim against the United States.

the United States; (ii) the Tucker Act jurisdiction is limited to monetary claims, but not to claims for an immediate payment of money; (iii) the lower court decisions supporting the Solicitor General are both few in number and unimpressive in authority; (iv) no reason of policy or practicality suggests that the Tucker Act and the Declaratory Judgment Act should be forcibly constricted so as to cover a smaller territory than that defined by their words; and (v) the Solicitor General cannot at this stage of the proceeding challenge the respondent's right to seek declaratory relief on the facts of this case.

I

THE DECLARATORY JUDGMENT ACT

A. The Act Creates a New Remedy and Does Not Affect Jurisdiction

It is as important to our analysis as it is to the Government's that there be clear recognition, in the Government's words [Br. 9] that:

> "* * * the Declaratory Judgment Act itself cannot be a fountainhead of subject matter jurisdiction for the federal courts. It makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code."

This shown on the face of the Act. 28 U.S.C. § 2201 authorizes "any court of the United States" to "declare the rights and other legal relations of any interested party" when such a declaration is sought "In a case of actual controversy *within its jurisdiction.*"

It is settled beyond dispute that the Act produces "changes merely in the form or method of procedure by which federal rights are brought to final adjudication" and "[t]he issues raised * * * are the same as those which under old forms of procedure could be raised * * *."

Nashville, C. & St. L. Ry v. Wallace, 288 U.S. 249, 264 (1933). "It does not purport to alter the character of the controversies which are the subject of the judicial power * * *." *United States v. West Virginia*, 295 U.S. 463, 475 (1935). The Court has variously recognized that "the operation of the Declaratory Judgment Act is procedural only," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937); that in exercising "control of practice and procedure the Congress is not confined to traditional forms or traditional remedies." *Id.* at 240; and that "[t]he statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies both at law and in equity, which the Judiciary Acts had already conferred," *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943). Finally, in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 669, 671-72 (1950), the Court again explained that in passing the Declaratory Judgment Act: "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."

We have not, then, any question as to whether the Congress in the Declaratory Judgment Act intended to enlarge the jurisdiction of the Court of Claims, or to expand the types of cases in which it had waived the sovereign immunity from suit. The question is simply whether the Congress intended the Court of Claims to use this new procedure or new remedy within the confines of the jurisdiction already conferred by the Tucker Act.

B. The Words of the Statute

The Declaratory Judgment Act as enacted in 1934 empowered "the courts of the United States" to grant declaratory relief. 48 Stat. 955.

The statute was enacted during the comparatively brief period in which the Court of Claims was viewed as a legislative, not a constitutional, court. *Ex parte Bakelite*, 279 U.S. 438, 452-457 (1929); *Williams v. United States*, 289

U.S. 533 (1933).[5] These decisions were disclaimed by the Congress in 1953 (67 Stat. 226) and overruled by *Glidden Company v. Zdanok*, 370 U.S. 330 (1962). The legislative or constitutional status of the Court of Claims is immaterial to the application of the Declaratory Judgment Act. In *Ex parte Bakelite*, the Court stated (279 U.S. at 453) that "Without doubt that court [Court of Claims] is a court of the United States within the meaning of §375 of title 28, U.S.C.[6] * * * but this does not make it a constitutional court." *Williams* contains nothing to qualify the recognition that the Court of Claims as a legislative court was a "court of the United States."[7] (b) If for any reason it were thought that only Article III courts can be

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[5]The Court of Claims was taken to be exercising judicial power admitting of Supreme Court review in *DeGroot v. United States*, 5 Wall. 419 (1867), the Congress having cured the revisory power of the Executive which precluded review in *Gordon v. United States*, 2 Wall. 561 (1865). It was thereafter assumed to be an Article III court. *E.g.*, *United States v. O'Grady*, 22 Wall. 641, 648 (1875); *United States v. Union Pacific R. Co.*, 98 U.S. 569, 603 (1879); *Miles v. Graham*, 268 U.S. 501 (1925).

[6]The Court here cited 21 Op. A.G. 449 (1896), holding the Chief Justice of the Court of Claims a "judge" of that Court and thus eligible for retirement at full pay as a "judge of any court of the United States," under R.S. § 714. Then § 375 of 28 U.S.C. related to the retirement of judges of courts of the United States.

[7]The territorial courts, with a restricted geographic jurisdiction and a presumably transitory life, are in contrast to the Court of Claims not "courts of the United States," for reasons very fully explained in *O'Donaghue v. United States*, 289 U.S. 516, 535-538 (1933); *Glidden Company v. Zdanok*, 370 U.S. 530, 544-548 (1962). Beyond that they are not included as a "court of the United States" in 28 U.S.C. § 451. In consequence the Declaratory Judgment Act has been held inapplicable to the territorial courts, *Reese v. Fultz*, 96 F. Supp. 449 (D. Alaska, 1951); *Ottley v. DeJough*, 149 F. Supp. 75 (D.V.I., 1957). When the *Reese* case was called to the attention of the Congress it amended § 2201 to apply to "any court of the United States and the District Court for the territory of Alaska." 68 Stat. 890 (1954).

"courts of the United States," both the Congress in 1953[8] and this Court in *Glidden* have declared *Bakelite* and *Williams* to have been wrongly decided.

Whatever doubt might be argued to be found in the words of the 1934 Act was removed in 1948, when the Judicial Code was revised and reenacted. The Declaratory Judgment powers in 28 U.S.C. §2201 were made applicable to "any court of the United States," and in 28 U.S.C. §451 (*supra*, p. 6) the Court of Claims was specifically included within the definition of a "court of the United States."

The Revisers of the 1948 Code were emphatic that they intended no change in law.[9] The explicit application of the Declaratory Judgment Act to the Court of Claims made in 1948 thus confirms the conclusion that the 1934 Act was also applicable. If, however, it were viewed as a change in law, the 1948 Code must govern. See *e.g., Ex Parte Collett*, 337 U.S. 55 (1949); *United States v. National City Lines*, 337 U.S. 78 (1949); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 376 nn. 11-12 (1949); *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 (1953).

The Solicitor General, it will be noted, offers no rationale by which the explicit words of 28 U.S.C. §§451 and 2201 may be put aside. He has simply ignored the words of the statute.

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[8] 28 U.S.C. 171 was amended to declare that the Court of Claims is "a court established under Article III of the Constitution." 67 Stat. 226.

[9] The Revisers saw that "great care [was] exercised to make no changes in existing law which would not meet with substantially unanimous approval." S.Rpt. No. 1559, 80th Cong., 2d Sess., p.2. The explanation of the revision of § 2201 makes no reference to the Court of Claims, and §451 was explained as being "inserted to make possible a greater simplification on consolidation of the provisions incorporated in this title." 28 U.S.C. at 5913, 6026-6027 (1964)

C. The History of the Act

1. *The Course of Enactment.* The first legislative proposal for adoption of federal declaratory judgment procedure was S. 5304 during the 65th Congress. The bill was sponsored by the American Bar Association. It made no progress during the 65th Congress. Identical bills were introduced in both houses in the 66th through 71st Congresses,[10] and while passed in the House in the 69th and again in the 70th Congresses,[11] did not receive Senate approval.

In the 72nd Congress, a revised version of the bill was introduced as H.R. 4624. The granting provision was revised to reflect some technical criticism of the bill, of no relevance to the issues now before this Court, made during hearings before a subcommittee of the Senate Judiciary Committee during the 70th Congress.[12] The revised version

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[10] S. 582, 66th Cong., 1st Sess. (1919); S. 4808, 66th Cong., 3d Sess. (1921); S. 629, 67th Cong., 1st Sess. (1921); H.R. 10143, 67th Cong., 2d Sess. (1922); S. 816, 67th Cong. 4th Sess. (1923); H.R. 5194, 68th Cong., 1st Sess. (1924); reported out of committee with H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); S. 3675, 68th Cong., 2d Sess. (1925); S. 615, 69th Cong., 1st Sess. (1925); H.R. 5365, 69th Cong., 1st Sess. (1925); reported out of committee with H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. 5564, 70th Cong., 1st Sess. (1927); H.R. 5623, 70th Cong., 1st Sess. (1927), reported out of committee with H.R. Rep. No. 288, 70th Cong., 1st Sess. (1928), debated and recommitted, January 18, 1928, reported out of committee as amended with H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. 9028, 70th Cong., 1st Sess. (1928); H.R. 23, 71st Cong., 1st Sess. (1929), reported out of committee with H.R. Rep. No. 94, 71st Cong., 2d Sess. (1929); S. 2501, 71st Cong., 2d Sess. (1929).

[11] H.R. 5365, 69th Cong., 1st Sess. (1926), 67 Cong. Rec. 9546 (May 17, 1926); H.R. 5623, 70th Cong., 1st Sess. (1928), 69 Cong. Rec. 2032 (January 25, 1928).

[12] See *Hearings on H.R. 5623 Before a Subcommittee of the Senate Committee on Judiciary*, 70th Cong., 1st Sess. (1928). Professors Borchard of Yale and Sunderland of Michigan were the main wit-

was reported favorably by the Committee and passed by the House during the 72d Congress, and finally was enacted in 1934 during the 73d Congress as Public Law 73-343.[13]

Despite the long period during which the legislation was subject to consideration, and the importance of the subject matter, there is surprisingly little legislative material from which a close analysis of the statutory provisions can be derived. Thus, in the more than 15 years Congress had bills under review, committee hearings were conducted on only three occasions, and these in turn were quite brief.[14] There was virtually no floor debate in either house.[15] And not

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nesses during the two days of hearings. Members of the Subcommittee were concerned with matters irrelevant here. No consideration was given to the meaning of the phrase "courts of the United States" or to the precise courts which would be vested with the power to grant declaratory relief, although one Senator's suggestion that the court coverage be limited to federal courts sitting in states that already enjoyed declaratory judgment procedures was opposed by the witnesses. Hearings 40, 44-45.

[13]H.R. 4624, 72d Cong., 1st Sess. (1931), reported out of committee with H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932), passed House, 76 Cong. Rec. 697-698 (December 19, 1932); S. 588, 73rd Cong., 2d Sess. (1934); H.R. 4337, 73rd Cong., 2d Sess. (1934), reported out of committee with H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934), passed House, May 7, 1934, 78 Cong. Rec. 8224, passed Senate, June 9, 1934, 78 Cong. Rec. 10919.

[14]*Hearings of Legislation Recommended by the American Bar Association*, Before the House Committee on the Judiciary, 67th Cong., 2d Sess. (February 21, 1922) 19 pp.; *Hearings on H.R. 5365 Before the House Committee on the Judiciary*, 69th Cong., 1st Sess. (March 25, 1926) 19 pp.; *Hearings on H.R. 5623 Before a Sub-Committee of the Senate Committee of the Judiciary*, 70th Cong., 1st Sess. (April 27 and May 18, 1928) 81 pp.

[15]Of the seven times the proposed act was on the House floor from 1925 through 1934, five times it appeared on the consent calendar, twice meeting objection from Representative Collins of Mississippi, 66 Cong. Rec. 4874 (1925 - 68th Cong., 2d Sess. – objected to); 67 Cong. Rec. 9546 (1926 - 69th Cong., 1st Sess); 75 Cong. Rec. 14091 (1932 - 72d Cong., 1st Sess. – objected to); 76 Cong. Rec. 697-698 (1932 - 72d Cong., 2d Sess.); 78 Cong. Rec. 8224 (1934 - 73d Cong., 2d Sess.). The other two times it was de-

only were all committee reports abbreviated, but those of the House committees were on all occasions virtually identical.[16] In the resulting materials, attention was focused on three principal issues: whether a declaratory judgment would be justiciable as a case or controversy; whether declaratory relief should be available at the instance of a single party, or whether consent of both opposing litigants should be required; and the *res judicata* implications of the judgment.

2. *Indicia of Coverage.* Although there was no specific discussion of the courts in which the procedures would be applicable, we believe such limited materials as do exist furnish strong indication that Congress viewed the legislation as applicable to the Court of Claims.

First, when the original legislation was introduced during the 65th Congress, it was accompanied by an explanatory memorandum written by Professor Borchard which cited litigation over "conflicting questions of title to certain funds * * * *between private individuals and the Government*" as one of the categories of cases covered by the legislation.[17]

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bated, but almost the entire debate concerned the act's constitutionality and its coercive rather than voluntary nature. 69 Cong. Rec. 1680-1688, 2025-2032 (1928 - 70th Cong., 1st Sess.).

[16] H.R. Rep. No. 1441, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 928, 69th Cong., 1st Sess. (1926); H.R. Rep. No. 288, 70th Cong. 1st Sess. (1928); H.R. Rep. No. 366, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 94, 71st Cong., 2d Sess. (1929); H.R. Rep. No. 627, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1264, 73d Cong., 2d Sess. (1934). The House reports were all two pages in length and differed only with respect to the exact language of the statute and the reference to the number of states with similar legislation. S. Rep. No. 1005, 73d Cong., 2d Sess. (1934) did not follow the House model.

[17] The Declaratory Judgment, Brief by Edward M. Borchard, printed for the use of the Senate Judiciary Committee in connection with S. 5304, 65th Cong., 3d Sess. (1919) (Emphasis supplied); the brief is no longer available but is said by the Fox Compilation on Declaratory Judgment (1937) to be the same as Borchard's articles in 28 Yale L.J. 1, 105 (1918).

This statement was repeated in the hearings, and was referred to by Representative Celler during debate on the floor of the House incident to passage of H.R. 5623, 70th Cong., 1st Sess. Incidental note was made in these references to declaratory judgments against the Government under the British and New York acts.[18]

Second, while there was no undertaking in the legislative materials to give specific content to the phrase "courts of the United States" as used in the bills, references throughout the materials identified the proposed procedure as applicable in "federal courts," suggesting that the term was to be given broad, rather than narrow interpretation.[19]

Third, there are references on several occasions to the Court of Claims itself. Thus in testifying before a subcommittee of the Senate Committee on the Judiciary during the 70th Congress, Professor Borchard in explaining the uses to which the declaratory judgment could be put noted that:[20]

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[18] *Hearings on Legislation Recommended by the American Bar Association before the House Committee on the Judiciary,* 67th Cong., 2d Sess. 11 (1922); 68 Cong. Rec. 1687, 2029 (1928).

[19] *Hearings on Legislation Recommended by the American Bar Association before the House Committee on the Judiciary,* 67th Cong., 2d Sess. 5, 11 (1922); *Hearings on H.R. 5623 Before a Sub-Committee of the Senate Committee on the Judiciary,* 70th Cong., 1st Sess. 14, 25, 26, 27, 28, 38, 39 (1928).

In House debate on one of the early bills, it is true, a statement was made by Committee Chairman Montague that the Act "applies to Federal district courts and the courts in the District of Columbia." 66 Cong. Rec. 4874 (1925). But nothing in the context in which the statement was made suggests that it was meant to be a formal definition of the scope of the Act, particularly since Montague went on to point out that it only applied to "courts of original jurisdiction," which quite clearly would include the Court of Claims.

[20] [Hearings on H.R. 5623 before the Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., p. 21 (1928) (emphasis supplied).]

> "You can get a declaratory judgment for damages rather than a coercive decree. *For example, every judgment of the Court of Claims of this country is a declaratory judgment.*"

And in the final Senate Committee Report on the legislation, this statement of Borchard's was repeated and enlarged upon:[21]

> "The fact is that the declaratory judgment in a limited form has been known to the common law, or under statute, for many years . . . [O]ther illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names. *The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution.*"

3. *The Tax Exception.* In 1935 the Agricultural Adjustment Act was amended to bar declaratory relief against taxes imposed under that Act, 49 Stat. 750. A week later the Declaratory Judgment Act was amended to except disputes "with respect to taxes." 49 Stat. 1014, 1027. In 1935 suit for tax refund could be brought either against the Collector in the District Court or against the United States under the Tucker Act, which limited District Court jurisdiction to claims under $10,000 unless the Collector was dead or out of office. *Flora v. United States,* 362 U.S. 145, 152-153, 188-190 (1960).[22] When the suit against the Collector was restored by statute it became "in its nature a remedy against the Government" *Curtis's Administratrix v. Fiedler,* 2 Black 461, 479 (1863); *Flora v. United States, supra,* at 153. The 1935 exceptions of disputes over tax claims from the Declaratory Judgment Act were enacted because of concern that the statute otherwise would interfere

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[21] S. Rpt. No. 1005, 73d Cong., 2d Sess., pp. 4-5 (emphasis supplied).

[22] 24 Stat. 505; Section 1310(c) of the Revenue Act of 1921, 42 Stat. 311, as amended, 43 Stat. 972 (1925); Act of February 26, 1845, c. 22, 5 Stat. 727.

with the "orderly and prompt determination and collection of federal taxes." S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).[23] Obviously, there would have been no cause for this concern if the Declaratory Judgment Act had not been viewed as applicable to litigation under the Tucker Act and under similar statutes waving sovereign immunity for claims against the United States. There is nothing in the legislative history to suggest that the 1935 exception was directed only to suits against the Collector and not to the Tucker Act.[24]

4. *Subsequent History.* We have found no indication that the failure of the Court of Claims to utilize declaratory judgment procedures was ever called to the attention of Congress prior to the decision now under review.[25]

[23]S.Rep. No. 1240 was directed to the Declaratory Judgment Act amendment. The reports on the Agricultural Adjustment Act similarly explain the purpose "to prevent the difficulties and embarrassments to the administration of the act which such actions cause and to confine the taxpayer to the usual and orderly procedure of paying the tax and then suing for refund." S. Rpt. No. 1011, 74th Cong., 1st Sess., p. 23 (1935); H. Rpt. No. 1241.

[24]See S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935); H.R. Rep. No. 1885, 74th Cong., 1st Sess. 13 (1935); 79th Cong. Rec. 13227-28 (1935); Borchard at 850-57.

The position of the Department of Justice in 1935 was (a) Congress never intended to apply the declaratory judgment procedure to tax matters because the revenue laws constituted a self-sufficient system of tax collection and protest separate from and unaffected by procedures of general utility not specifically declared applicable in tax matters, and (b) the amendments contained in the Revenue Act of 1935 and the Act of August 24, 1935 eliminated any doubts that may have existed as to the soundness of that conclusion. Department of Justice, Tax Division, Memorandum in regard to the Applicability of the Federal Declaratory Judgment Act to Suits Involving Federal Taxes, September 20, 1935 (contained in the Fox Compilation on Declaratory Judgments (1937), at pp. 15-22, 32-33. Nowhere in this exhaustive memorandum does the Department assert that the Declaratory Judgments Act is inapplicable to suits against the Government in the Court of Claims or elsewhere.

[25]In the nature of the inquiry we cannot represent that there is nothing we could have overlooked in the years since the Declaratory

In 1968, however, the Senate considered S. 1704, 90th Congress, which would authorize the Court of Claims to issue all orders available to a district court in a suit against the United States. It did not reach House Committee consideration but passed the Senate after a report which accepted as correct the present decision.[26]

5. *The Petitioner's Argument.* The Government's brief deals with this considerable body of legislative history in a few scattered sentences and phrases [Br. 8, 11, 17, 22]. It twice places some reliance [Br. 8, 22] on a phrase in the Senate report dealing with the 1935 tax amendment to the

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Judgment Act was enacted. We have, however, reviewed every amendment proposed with respect either to that Act or to the jurisdiction of the Court of Claims, and can say that we would be surprised if the Congress had at any time been advised of this apparent restriction of the scope of the declaratory judgment relief.

Compare Public Law 83-682 under which Congress made the Declaratory Judgment Act applicable to Alaska when the decision in *Reese v. Fultz, supra,* holding the Act inapplicable to the District Court of Alaska, was called to its attention.

[26]S. Rpt. No. 1465, 90th Cong., 2d Sess. (July 25, 1968), p. 3, reads:

> "Declaratory judgment actions also present an area in which there is a need to broaden the Court of Claims remedial power. In *John P. King v. United States* (Ct. Cl. 1968), the power of the Court of Claims to grant declaratory judgments pursuant to 28 U.S.C. 2201-2202 was established. However, at present the power of the court to grant further relief as an adjunct to its declaratory judgments is not clear. The enactment of S. 1704 will broaden the relief which the court can give a claimant pursuant to 28 U.S.C. 2202 where the court decides that a claimant is entitled to a declaratory judgment but cannot recover any money. For example, an illegally discharged Government employee may, after the passage of S. 1704, bring a suit in the Court of Claims to recover back pay and, at the same time, seek restoration of his former position. If the evidence demonstrates that the employee's earnings during the period of his illegal discharge exceeded his Government pay, the court's judgment on the illegal discharge would be limited to a declaratory judgment, but it could as an incident of such a judgment order him reinstated."

Declaratory Judgment Act, that the Act provided "a procedure designed to facilitate the settlement of private controversies." S. Rpt. No. 1240, 74th Cong., 1st Sess. p. 11. This cannot be read to suggest that the Declaratory Judgment Act was inapplicable to the Court of Claims, but in context was simply designed to contrast tax with other litigation. The 1935 amendment was added to the House-passed bill by the Senate Finance Committee, without prior discussion in hearings. The Committee's Report asserts that application of the Act to taxes would be a "radical departure from the long-continued Congressional policy with respect to taxes." It then states that this policy should not be disturbed by engrafting the declaratory judgment procedure ("a procedure designed to facilitate the settlement of private controversies") upon tax litigation.[27] This is quite insufficient to overcome the natural inference that the 1935 amendments were necessary precisely because the declaratory judgment would otherwise have been available in suits against the United States.

For the rest, the petitioner shows nothing contrary to our analysis except for a statement that S. 1704, 90th Congress, in which the Senate Committee accepted and approved the decision below, "died in the House." As it reached the House only on July 29, 1968, its death was hardly premeditated execution.

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[27]S. Rep. 1240, 74th Cong., 1st Sess. (1935), at p. 11. The Committee in essence adopted the position of the Department of Justice that tax litigation was and should remain a self-contained system (fn. 24, *supra*). A minority of the Committee saw no difficulty in applying the Act to tax matters and recommended that it be amended specifically to apply to all taxes not within the jurisdiction of the Board of Tax Appeals. *Id.* Pt. 2 at p. 9.

II

THE TUCKER ACT

The whole foundation of the Government's case is, as we have indicated (*supra*, p. 11), a belief that the Tucker Act extends jurisdiction to the Court of Claims, and waives the sovereign immunity to suit, only with respect to a claim for an immediate payment of money. This in turn derives not from the statute but from a phrase – "money judgment" – often used to describe the jurisdiction of the court below. That phrase was a useful shorthand in the context of the issues where it was used, but cannot possibly be taken as a rigid statutory limitation of jurisdiction.

A. The Statute

The Tucker Act, 28 U.S.C. §1491, grants jurisdiction to the Court of Claims –

> "to render judgment upon any claim against the United States founded either upon the Consitution, any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

One obviously has a "claim" against the Government whether it is embodied in an immediate demand for a defined number of dollars or whether its monetary impact cannot yet be accurately measured. There would be a nice question if the statute, as the Government's argument, referred only to a "present claim;" one could argue either way as to whether one had a "present claim" which could not yet be measured in a precise number dollars. But there is *no* question, under the words as they were enacted. The Government's case requires that the phrase enacted by the Congress be changed to read –

> * * * to render judgment upon any claim against the United States, *for the present payment of money*, founded * * *

That is a rather ambitious program of statutory construction. It is not in any way achieved by pointing to the evident fact that the historical foundations of the Court of Claims trace to the desire of the Congress to have a special tribunal to consider the matters otherwise presented by private bills [Govt. Br. 16-17]. In the first session of the 49th Congress, immediately before the passage of the Tucker Act, only 10% of the private acts called for the payment of money presently due. In the first session of the 33d Congress, immediately prior to the first Court of Claims legislation, only 45% of the private acts called for the payment of money presently due.[28] It is not possible to determine how many of the other private acts would have been appropriate under 20th century practice for declaratory relief, nor how many of the money payment bills would have been more sensibly handled by such a procedure.[29] But it is clear that the private acts of Congress dealt with many claims other than for the present payment of money, and the historical occasion for the Tucker Act affords no warrant for reading "claims" so narrowly.

It should finally be noted that 28 U.S.C. § 1496 authorizes the Court of Claims to relieve disbursing officers of liability for lost money or records. This is unmistakably declaratory relief (see *infra*, p. 32). Section 1496 is worded: "The Court of Claims shall have jurisdiction to render judgment upon any *claim* by a disbursing officer * * *." It would require a rather intricate explanation to show why "claim" in §1496 grounds a declaratory judgment and yet the same

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[28]The private acts in these two sessions are tabulated, with probably excessive diligence, in the Appendix to this brief, *infra*.

[29]The Act of August 1, 1854, is one random example. It directed payment of $8,005.43 to the estate of General Nathanial Greene, with interest at 6% since July 6, 1794, for expenses arising out of the Revolution. One would judge that it took 15 years to crystallize the money claim and then 60 years to collect it. It would seem likely that at some stage during the 75 years declaratory relief would have been advantageous to both parties.

word "claim" in §1491 grounds only a judgment for money presently due.[30]

B. The "Money Judgment" Formula

We come here to the heart of the Government's position. The Solicitor General in a single paragraph [Br. 10] asserts that repeated decisions of this Court limit "the jurisdiction of the Court of Claims to cases involving a demand for a money judgment." Upon this paragraph his whole argument turns.

Our reply is most simply made by completing the partial quotation from *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962), upon which the Government chiefly relies: "From the beginning it has been given jurisdiction only to award damages, *not specific relief*." The three italicized words are omitted by the Solicitor General. When they are included, they show that the "money judgment" formula has been used, in *Glidden* as in its predecessors, to contrast a money claim with specific, coercive relief against a Government official. In that context, it is incontestably accurate. But the formula is put to an unintended use when the accident of its phrasing is made the foundation of an argument that the Tucker Act "claim" for money cannot occasion declaratory relief at any point prior to its final crystallization into a defined number of dollars.

The "money judgment" description of the Court of Claims jurisdiction traces back to *United States v. Alire*, 6 Wall. 573 (1867). The Court of Claims, shortly after its reorganization by the Act of March 3, 1863, 12 Stat. 765, had

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[30] That explanation does not arise in the prior texts of the acts. The 1911 Judicial Code conferred jurisdiction in §145, First [predecessor of §1491] over "all claims (except for pensions)" and in §145, Third [predecessor of §1496] over "The claim of any * * * disbursing officer." 36 Stat. 1136. The Tucker Act in §1 [predecessor of §1491] gave jurisdiction over "all cl... s founded * * *." 24 Stat. 505. The Act of May 8, 1866 in §1 [predecessor of §1496] gave jurisdiction over "the claim of any * * * disbursing officer." 10 Stat. 44.

ordered the appropriate official to issue a warrant for "bounty" lands. This Court reversed because §7 of that Act made provision only for the payment of money judgments and had no reference to specific relief; the statute must accordingly be confined "to cases in which the petitioner sets up a moneyed demand as due from the Government" (6 Wall. at 576).

Alire was followed by *United States v. Jones*, 131 U.S. 1, 19 (1889), arising under the Tucker Act. The circuit court acting under that jurisdiction had directed the issuance of patents to timber lands. The Court held that, in the absence of provisions "for carrying into execution of decrees for specific performance, or for delivering the possession of property in kind," the Tucker Act jurisdiction remained limited to "money decrees and money judgments." Any other result would be anomalous:

> "... we should have been somewhat surprised to find that the administration of vast public interests, like that of the public lands, which belongs so appropriately to the political department, had been cast upon the courts—which it surely would have been, if such a wide door had been opened for suing the government to obtain patents and establish land claims.* * * *" *Id.* at 19.

Alire and *Jones* establish that the Court of Claims has no power to grant specific or coercive relief against any Government official. It seems to follow, as they held, that its jurisdiction is limited to "money demands" (6 Wall. at 576), "money claims" (131 U.S. at 19), "claims for money" (131 U.S. at 17, 18), "claims for money only" (131 U.S. at 17), or "moneyed demands" (6 Wall. at 576, 131 U.S. at 17). But it does not at all follow that a monetary claim lies outside the jurisdiction of the court simply because it is not when the petition is filed reduced to a specific claim for a specified number of dollars. At the time of *Alire* and *Jones*, to be sure, a money judgment was the only relief available by which to dispose of a monetary claim. After the Declaratory Judgment Act, an alternative form of relief was avail-

able to dispose of that sort of claim. Any argument that "jurisdiction" is limited to the forms of relief available prior to the Declaratory Judgment Act would make the Act inapplicable to every court, since as the parties agree that Act does not expand the jurisdiction of any court.

This Court has on a number of occasions repeated the "money judgment" phrasing of *Alire* and *Jones*, but always in a context quite irrelevant to the issues here. In *Glidden*, as we have seen (*supra*, p. 26) the contrast between monetary claim and specific relief is specifically drawn. In *United States v. Sherwood*, 312 U.S. 584 (1941), the Court held there was no Tucker Act jurisdiction of a claim against the United States possessed by the plaintiff's judgment debtor; it noted that the Court of Claims "jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States [citing *Alire* and *Jones*] and if the relief is sought against others than the United States the suit [is] * * * beyond the jurisdiction of the court" (312 U.S. at 588); the Court's attention was naturally directed to the jurisdiction over parties other than the United States and not at all to the issue here.[31] In *United States v. Jones*, 336 U.S. 641, 670-671 (1949), the Court held that district court review of a railway mail pay order was appropriate; and that the Court of Claims had no jurisdiction, *inter alia*, because "the Court of Claims has jurisdiction only to render a money judgment against the United States and none to remand to the Commission * * *" While we have doubt that the reasoning on this point retains much substance after *United States v. Bianchi & Co.*, 373 U.S. 709, 717-718 (1963), this is simply another application of the contrast

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[31] The Government's heavy reliance upon Sherwood [Br. 14-15] does not take into account the fact that *Glidden* overrules two of the *Sherwood* dicta: (a) that the Court of Claims is a legislative court, and (b) that only for this reason can a jury trial be eliminated (312 U.S. at 587; 370 U.S. at 572).

between a monetary claim and a specific direction that Government officials take prescribed action.[32]

C. The Settled Jurisdiction and Practice of the Court of Claims

The Court of Claims in *Twin Cities Properties, Inc. v. United States*, 81 C.Cls. 655, 658 (1935), discussed more fully below, stated that declaratory relief was "foreign to any jurisdiction this court has heretofore exercised." This, as the court below showed [App. 26-28], is extravagantly wrong.

1. *The Money Judgment*: The very "money judgment" upon which the Government insists is itself only a declaratory judgment, for the Court of Claims has no power of execution. *Yale & Towne Mfg. Co. v. United States*, 67 C.Cls. 618 (1929); *Hatfield v. United States*, 78 C.Cls. 419 (1933). The declaratory nature of the Court of Claims judgments was emphasized in the course of enacting the Declaratory Judgment Act, both in the testimony of Professor Borchard and in the report of the Senate Committee (*supra*, pp. 19-20). The unenforceable nature of the Court of Claims judgment was relied upon by this Court in *Nashville, C. & St.L. Ry. v. Wallace*, 288 U.S. 249, 263 (1933) to show the justiciability of a state declaratory judgment proceeding. Conversely, *Aetna Life Insurance Co. v.*

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[32] *Bonner v. United States*, 9 Wall. 156 (1870); simply held that inability to take the bounty land promised by Virginia, even though caused by the United States, did not present a claim under a law or contract of the United States.

The Court of Claims cannot award nominal damages. Whatever the reason for the rule (which is merely stated but not explained in the cases cited by the Government [Br. 10]), it applies also in admiralty. *The Hunstonworth*, 4 F. Supp. 656 (E.D. N.Y., 1933); *The Thrasyvoulos*, 28 F. Supp. 434, 437 (S.D. N.Y.). It is, therefore, unrelated to the power to give declaratory relief (see, *infra* p. 40). Declaratory relief, moreover, is available only to resolve actual controversies in which the plaintiff has a practical, nor merely a theoretical, interest. *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 243 (1952).

Haworth, 300 U.S. 227 (1937), sustaining the Declaratory Judgment Act, has been relied upon to show the justiciability of cases arising under the miscellaneous jurisdiction of the Court of Claims. *Glidden Company v. Zdanok*, *supra*, 574.

2. *Prospective Force*. The "money judgment" of the Court of Claims is formally exhausted upon its entry. But none can doubt that it also declares rights for the future, and that the Government officials and citizens affected will each conform their future conduct to this declaration of legal right. It serves as to the future the precise office of a declaratory judgment.

This is not only a rule of practical conduct but, on the ground of collateral estoppel, is enforced by the Comptroller General. Thus, a 1956 Court of Claims decision determining the proper level of retirement pay must be applied for the period after judgment. Opinion B-129914, 36 Comp. Gen. 501 (1957). See, too, Opinion B-114422, 36 Comp. Gen. 489 (1957); Opinion B-142326, 44 Comp. Gen. 821 (1965). See generally, *Meador, Judicial Determination of Military Status*, 72 Yale L.J. 1294, 1304-07 (1963).[33]

If, however, the Government officials should for any reason refuse to apply in the future the law declared in the Court of Claims decision, the earlier decision will be applied as *res judicata*, or by collateral estoppel, so soon as the plaintiff should present to the Court of Claims a petition for subsequently accrued amounts. See, most notably, *Moser v. United States*, 42 C.Cls. 86 (1907); *Jasper v. United States*, 43 C.Cls. 368 (1908), reversing the *Moser* rule because of a statute overlooked in *Moser*; *Moser v. United States*, 49 C.Cls. 285 (1914), holding the earlier decision *res judicata*; 239 U.S.

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[33]The Comptroller General has, however, refused to give collateral estoppel effect to issues, such as right to office, in which the Court has held itself without jurisdiction, Opinion B-142023, 42 Comp. Gen. 323 (1962), and in cases where the United States has confessed liability so that there was no adjudication of issues by the Court, Opinion B-135719, 43 Comp. Gen. 266 (1963).

658 (1915), appeal by United States dismissed on its motion; 239 C.Cls. 658 (1915); 53 C.Cls. 639 (1918); 58 C.Cls. 164 (1923); *United States v. Moser*, 266 U.S. 236 (1924), holding the first decision conclusive.

3. *Rule 47(c).* Rule 47(c) of the Court of Claims provides in part—

> "* * * a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for further proceedings.
>
> "(2) * * * the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings. In such event, the judgment on the question of the right to recover shall be final, * * *"

Rule 47(c) judgments are declaratory judgments and nothing else.[34] Their validity does not in any way turn upon whether or not the plaintiff subsequently recovers a money judgment.[35] Thus, the court below said [App. 27]:

> "It is not unknown for a plaintiff with a holding of liability to find himself unable to obtain a money judgment. In contract matters he may be unable to prove damages; in personnel removal cases (civilian or military) he may have had more outside earnings than his government pay or he may be unable to prove that he was ready, willing, and able to work during his unlawful separation."

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[34] They are also final judgments for purposes of the certiorari jurisdiction of this Court. *United States v. Adams*, 383 U.S. 39 (1966); *Peartree, Statistical Analysis of the Court of Claims*, 55 Geo. L.R. 541, n. 38 (1967).

[35] As the court below noted of *Everett v. United States*, 169 C.Cls. 11 (1965), the Court in determining liability under Rule 47(c) may reach conclusions which made it conclusive that the plaintiff can recover no damages. As it chanced, *Everett* was left in a position to recover a trifling amount for accrued sick leave when discharged. 169 C.Cls. at 62.

Often, too, a plaintiff who obtains a declaration of liability under Rule 47(c) may obtain the necessary adjustments in his continuing accounts with the Government so that there is no occasion to proceed to money judgment and the suit is dismissed after the declaration of rights.[36] In any of these variations, the court is granting declaratory relief, nothing more and nothing less.

4. *Miscellaneous Jurisdiction.* The Court of Claims has two collateral sources of jurisdiction which similarly will call for a declaration of rights rather than a money judgment.

(a) The plaintiff who seeks to settle his account with the United States under 28 U.S.C. §1496 may often, as in *Shaw v. United States*, 174 C.Cls. 899 (1966), be seeking only a declaration of no liability.

(b) The court is given explicit and exclusively declaratory jurisdiction by 28 U.S.C. §1497, authorizing "judgment upon any claim by a disbursing officer * * * for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge."

In sum, the Court of Claims in one view enters nothing but declaratory judgments and in any view has a broad and varied practice which unmistakably involves declaratory relief. Of all the courts of the United States it would seem most congenial to reception of Declaratory Judgment Act forms of relief. The court below quite properly refused to give the short-hand phrase "money judgment" an overriding force so that it could be applied, far out of context, both to restrict the scope of the Declaratory Judgment Act and to limit the traditional functions of the Court of Claims.

5. *Equitable "Jurisdiction."* We note, only out of completeness, that the inquiry is not advanced by pinning the label of "equitable relief" upon the Declaratory Judgment

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[36] It is not possible from the published reports to determine the cases in which this was done. We should suppose it to be a frequent occurrence. One example is *American President Lines, Ltd. v. United States*, 154 C.Cls. 695, 754 (1961).

Act and supplying a middle premise that the Court of Claims has no equitable jurisdiction. We do not understand the Government directly to press this argument [Br. 13-14]. It could not in any case be sustained. (a) The declaratory judgment has elements of equity relief, particularly in its origins and in that its grant lies within the discretion of the Court. *Eccles v. Peoples Bank*, 333 426, 431 (1948); *Great Lakes Co. v. Huffman*, 319 U.S. 293, 300 (1943). But it is not an equitable proceeding, being "neither distinctly in law nor in equity, but *sui generis*." S.Rpt. No. 1005, 73d Cong., 2d Sess., p. 6 (1934); *Sanders v. Louisville & N.R.R.*, 144 F.2d 486 (CA 6, 1944). (b) Nor for that matter is the Court of Claims an alien to equitable remedies. In disposing of money claims it may supply equitable relief, such as the reformation of contract, incident to that adjudication. *United States v. Milliken Imprinting Co.*, 202 U.S. 168 (1906); *District of Columbia v. Barnes*, 197 U.S. 146 (1905); *Aetna Construction Co. v. United States*, 46 Ct. Cl. 113 (1911). Since, in our view, declaratory relief can be considered only in respect to a monetary claim it would, even if characterized as "equitable" in nature, fall well within the traditional incidental powers of the Court of Claims. (c) Beyond all that, of course, is the fact that if as we have shown the Declaratory Judgment Act does apply, it is quite immaterial whether the remedies it has extended are differently labelled than those usually exercised by the Court of Claims.

III

THE DECISIONS INVOLVING DECLARATORY JUDGMENT IN SUITS AGAINST THE UNITED STATES

We consider that the case based upon analysis of the statutes is overwhelming that the Declaratory Judgment Act is applicable to cases within the Tucker Act jurisdiction. We must nevertheless recognize that, until the decision below, it has been generally stated or assumed, and occasionally held, that the Tucker Act permits no declaratory relief. At the same time it has been generally accepted that declaratory relief is available in all other forms of suit against the United States.

As we indicate below, the general understanding and course of decision under the Tucker Act did not rest upon any close analysis of the statutes by any court or commentator, but reflected at the most the same simple out-of-context application of the phrase "money judgment" which the Solicitor General advances here. We consider that the reversal, by a unanimous court below, of its 1935 decision in *Twin Cities Properties v. United States*, 81 C.Cls. 655, and of its successors, is itself dramatic evidence of the weakness of that rule once a careful examination of its foundations is made.

A. The Tucker Act

1. *Court of Claims*. This Court has never had occasion to consider the issue. The supposed rule against declaratory relief under the Tucker Act derives, therefore, directly or immediately from *Twin Cities Properties v. United States*, 81 C.Cls. 635 (1935). The case was decided very shortly after enactment of the Declaratory Judgment Act, and disposed of the issue in two short paragraphs. Plaintiff sought a declaration that the Post Office Department was not contractually entitled to terminate its lease of plaintiff's property in advance of the term of the lease. The Court dismissed, simply stating (81 C.Cls. at 658):

"* * * We think the defendant's motion should be sustained. In the case of *Pocono Pines Assembly Hotels Co. v. United States*, 73 C.Cls. 447, we had occasion to discuss *in extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States v. Milliken Imprinting Co.*, 202 U.S. 168; *Eastern Transportation Co. v. United States*, 272 U.S. 675; *United States v. Michel*, 282 U.S. 656.

"If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised."

None of the four cases cited in *Twin Cities* is relevant to its decision.[37] The text of the Court's discussion indicates that it viewed the Declaratory Judgment Act as expanding the jurisdiction of the courts to which it was applicable, a view which is untenable in the light of subsequent decisions (*supra*, pp. 12-13; Gov't Br. 8-9). The Court gave no atten-

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[37] *Pocono Pines* was a prolonged discussion of the development of the Court of Claims jurisdiction, demonstrating that the Court acts in a judicial capacity. Aside from incidental references to its "money judgment" jurisdiction, there is nothing in the decision in any way suggesting reasons why declaratory procedures would be inappropriate to the Court. *Milliken* held that the Court of Claims has jurisdiction to reform a contract, and like *Pocono Pines* has significance only in a passing suggestion that the Court's traditional jurisdiction must involve a claim for money judgment. The two other cases cited, *Eastern Transport* and *Michel*, simply state that the waiver of sovereign immunity must be founded on statute.

tion to either the words or the history of the Declaratory Judgment Act.[38]

The *Twin Cities* rule, however rudimentary its reasoning, has been accepted by the Court of Claims until its reexamination here. That acceptance has usually been by way of dicta, in cases where there was not in any event subject-matter jurisdiction in the Court,[39] or where the issue related to taxes and was excepted from the Declaratory Judgment Act.[40] There are, however, two cases which seem to us either square or alternate holdings reaffirming *Twin Cities*. These are *United States Rubber Co. v. United States*, 142 C.Cls. 42, 55 (denying declaratory judgment for period after judgment) and *Prentiss v. United States*, 115 C.Cls. 78, 81 (1949) (denying a declaration that entitled to a pension). *U.S. Rubber* simply noted and relied upon *Twin Cities* without further examination, and *Prentiss* simply cited the *Jones* case for the proposition that the Court of Claims can only render judgments for money presently due.

2. *The District Courts.* The cases arising in the district courts which touch upon the use of a declaratory judgment under the Tucker Act are numerous. There would seem to be no gain to the Court if we undertook to duplicate the exhaustive analysis and classification of decisions which was so carefully made by the court below [App. 15-19]. It is sufficient that there are a good many cases which assume or state that declaratory relief is not available under the Tucker Act, but only one district court case which actually

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[38]We have examined the briefs filed with the Court of Claims in *Twin Cities* and note that neither of the parties to that proceeding called to the Court's attention the legislative history of the Declaratory Judgment Act which we find persuasive of a congressional intention to include the Court of Claims within the provisions of the Act.

[39]*Hart v. United States*, 91 C.Cls. 308 (1940); *Kelly v. United States*, 133 C.Cls. 571 (1956); *Rolls-Royce Ltd. v. United States*, 176 C.Cls. 694, 701-702 (1966).

[40]*Sweeney v. United States*, 152 C.Cls. 516 (1961).

so holds. We shall here take note of the decisions which the Solicitor General says [Br. 12-13] are in conflict with the result below. For the rest, we do not consider that the analysis of the court below can be improved upon.

The Government lists nine court of appeals decisions as in conflict with the result below. In each of those cases the underlying controversy was held to be outside the court's jurisdiction, which the courts properly held was not expanded by the Declaratory Judgment Act. The actions were to compel employment by the Government,[41] to review agency action where the statute precluded, or was thought to preclude, review,[42] to fix for federal tax purposes the allocation of partnership income,[43] to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies and presented no actual controversy,[44] to prevent the sale of Government-owned property,[45] to declare against the United States the wheat quota legislation unconstitutional,[46] to hold the United States for breach by a service man of his assignment of pay,[47] to void against the United States an assignment of property,[48] and to obtain review of a compensation award expressly forbidden by statute.[49] From the premise that there was no jurisdiction of the subject matter, neither the court below nor *amicus curiae* would reach a different result in any of these cases.

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[41] *Love v. United States*, 108 F.2d 43 (CA 8, 1939).

[42] *Wells v. United States*, 280 F.2d 275 (CA 9, 1960).

[43] *Wilson v. Wilson*, 141 F.2d 599 (CA 4, 1944).

[44] *Gibson v. United States*, 161 F.2d 973 (CA 6, 1947).

[45] *Anderson v. United States*, 229 F.2d 675, 677 (CA 5, 1956).

[46] *Stout v. United States*, 229 F.2d 918 (CA 2, 1956).

[47] *United States v. Smith*, 393 F.2d 318, 319 (CA 5, 1968).

[48] *Clay v. United States*, 210 F. 2d 686 (CADC, 1953).

[49] *Blanc v. United States*, 244 F.2d 708 (CA 2, 1957).

In two of the cases, moreover, the Declaratory Judgment Act is not even mentioned.[50] In six others there is no discussion contradictory of the decision below; the courts simply state that the Declaratory Judgment Act does not in itself provide consent to sue the United States,[51] or create new substantive rights or jurisdiction,[52] or apply to suits as to federal taxes.[53] Only *Wells* (n. 36), accordingly, even contains language to support the Government's position, and that consists of a single sentence repeating the "money damage" formula of the *Jones* case (*supra*, p. 27).

The Government's cases may be supplemented by *Yeskel v. United States*, 31 F.Supp. 956 (D. N.J., 1940), which seems square holding contrary to the decision below, and by *Raydist Navigation Corp. v. United States*, 144 F.Supp. 503 (E.D. Va., 1956), which is a square holding in agreement with the decision below.

3. *The Commentators.* There has been only scant attention paid in the literature to the relationship between the Tucker Act and the Declaratory Judgment Act. *Moore* merely states the *Twin Cities* rule and accepts it without further discussion.[54] Professor Borchard, however, who was of course the chief architect of the Declaratory Judgment Act,[55] states the law as we understand it. The Declaratory Judgment, he says, may be used "within the permitted limits" but not "outside the terms of the Tucker Act." *Borchard, Declaratory Judgments*, 370, 373 (1941).[56]

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[50] *Clay*, n. 48, and *Blanc*, n. 49.

[51] *Gibson*, n. 44, *Stout*, n. 46, and *Anderson*, n. 45.

[52] *Love*, n. 41, and *Smith*, n. 47.

[53] *Wilson*, n. 43.

[54] 6A *Moore's Federal Practice* ¶ 57.02, p. 3011 (1966); see, also, *Developments in the Law – Declaratory Judgments*, 62 Harv. L.R. 787, 824 (1949).

[55] See, *e.g.*, H.R. Rep. 1264, 73d Cong., 2d Sess. 2 (1934); 69 *Cong. Rec.* 1687 (1928) (remarks of Representative Celler); *Hearings on Declaratory Judgments Before a Subcommittee of the Senate Comm. on the Judiciary*, 70th Cong., 1st Sess. 15-22, 70-81 (1929).

[56] It is true that he reads *Twin Cities* as in accord with his formulation, which we do not.

4. *In Sum.* The *Twin Cities* decision, however inadequate its analysis, has been followed in two Court of Claims decisions and a district court case, and its reasoning has been substantially duplicated in one decision of the Ninth Circuit. It has, in addition, been assumed to be correct in a considerably larger number of cases which are not in fact decisions upon the point. None of the opinions in the 33 succeeding years has in any way added to the depth or the breadth of the *Twin Cities* analysis. Even with those accretions over a third of a century, *Twin Cities* simply cannot be put into the same scale, much less balanced against, the massive and penetrating analysis of the court below in this case.

B. Other Suits Against the Government

The exclusion of declaratory relief from the Tucker Act prior to the decision below represented an anomaly in litigation against the Government. We note here the variety of suits in which it has been held available.

1. *Suits Against the Official.* There is settled authority that one may proceed in the district court for declaratory relief against the Government official who is acting in excess of his authority. *E.g.*, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 139-140 (1951); *Harmon v. Brucker*, 355 U.S. 579 (1958); *United States Lines Co. v. Shaughnessy*, 195 F.2d 385, 386 (CA 2, 1952); *Van Bourg v. Nitze*, 388 F.2d 557 (C.A.D.C., 1967); *Ashe v. McNamara*, 355 F.2d 277 (CA 1, 1965); *Ogden v. Zuckert*, 298 F.2d 312 (C.A.D.C., 1961); *Bland v. Connally*, 293 F.2d 852 (C.A.D.C., 1961).

The United States, moreover, is collaterally estopped by such a declaratory judgment against its official when the the issue is presented again in the Court of Claims. This is regularly held with respect to the plaintiff in the Court of Claims, *Green v. United States*, 145 C.Cls. 628 (1959); *Edgar v. United States*, 145 C.Cls. 9 (1959); *Larsen v. United States*, 145 C.Cls. 178 (1959); *Williams v. United States*, 134 C.Cls. 763 (1956), and the necessary element of mutu-

ality ensures that the estoppel operates also against the United States. *Technograph Printed Circuits, Ltd. v. United States*, 178 C.Cls. 543, 550-551 (1967).

2. *Suits in Admiralty*. The Declaratory Judgment Act has been held to apply to the United States in actions under the Suits in Admiralty Act, because "the wording of the Declaratory Judgment Act makes it broadly applicable to 'any court of the United States' which would include, presumably, the admiralty courts." *American-Foreign Steamship Corp. v. United States*, 291 F.2d 598, 604 (2d Cir.), cert. den. 368 U.S. 895 (1961). See, too, *American President Lines v. United States*, 162 F.Supp. 732 (D.Del., 1958), aff'd 265 F.2d 552 (3d Cir., 1959); *Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (2d Cir., 1963); *Luckenbach Steamship Co. v. United States*, 155 C.Cls. 81, 86 (1961).

The admiralty suit is brought against the United States *eo nomine* and is limited to a libel in personam for the recovery of money. 46 U.S.C. §§741, 742. There is no apparent reason why the same rule should not apply equally under the Tucker Act.

3. *Tort Claims Act*. A declaratory judgment is available, even where no money damages are immediately claimed, in a proceeding under the Tort Claims Act. *Pennsylvania R. Co. v. United States*, 111 F.Supp. 80 (D. N.J., 1953).[57] Here again, the United States is itself the defendant and jurisdiction is granted by 28 U.S.C. §1346(h) over "claims against the United States for money damages."

4. *NSLI Act*. The National Service Life Insurance Act provides, as the Tucker Act, that "In the event of disagreement * * * an action on the claim may be brought against the United States." 38 U.S.C. §§817, 445. "* * * if we decide

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[57] *Aktiebologet Bofors v. United States*, 93 F. Supp. 134 (1950), is a one-sentence decision to the contrary, but is of dubious authority since the Court of Appeals went off on a different ground. 194 F.2d 145, 150 (CADC, 1951).

that Section 808 authorizes suit against the Government, then I think it only reasonable to hold that Congress intended to consent to use of Declaratory judgment procedures." *Unger v. United States*, 79 F.Supp. 281, 283-284 (E.D. Ill., 1948).

5. *Trading With the Enemy Act.* So, too, declaratory relief is available in suits under the Trading With the Enemy Act, *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (CA 9, 1954), though to be sure the statutory jurisdiction ["a suit in equity . . . to establish the interest," 50 U.S.C. App. §9(a)] would seem to preclude any other result.[58]

The Solicitor General ignores this line of cases, and we can ourselves conceive of no reason why declaratory relief within the Court's subject matter jurisdiction should be available in every action against the Government except the Tucker Act.

IV

POLICY AND PRACTICALITY

It will be remembered that *amicus curiae* does not in any way seek to expand the type of actions which may be brought against the United States, but only by declaratory relief to settle monetary claims without awaiting the sometimes distant day when these claims have matured into a demand for the present payment of money.

Every principle of sound government and efficient judicial administration seems to point to the desirability of early rather than delayed resolution of controversies between the Government and its citizens. Indeed, one of the salient reasons for the establishment of the Court of Claims and enactment of the Tucker Act was to permit a more expeditious disposition of claims against the United States. As

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[58] When an Act is construed not to authorize suit against the United States, the Declaratory Judgment Act is of course not available. *Birge v. United States*, 111 F. Supp. 685 (W.D. Okla., 1953); *Schilling v. United States*, 101 F. Supp. 525 (E.D. Mich., 1951).

President Lincoln said in 1861, "It is as much the duty of the Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[59] The very first of the Court of Claims bills was introduced in 1854 to enable Congress "to render speedy justice to honest claimants."[60] The House Judiciary Committee reported out the bill which became the Tucker Act because "Just claims are painfully deferred [by the Congress] without interest. * * *"[61] That basic purpose of the Court, to afford speedy justice, can in cases such as those which concern *amicus curiae* (*supra*, pp. 1-5), be accomplished only through declaratory relief.

The Solicitor General urges [Br. 17-18] that use of declaratory relief would be the equivalent of a mandatory injunction against the United States—compelling the correction of records—or at least the equivalent of a remand to the officer. He looks to the binding force of the adjudication, not to the form of the decree, to draw these apprehensions. But exactly the same binding force, and exactly the same effect upon the Government's officers, is found in the final money judgment of the Court of Claims (*supra*, p. 29). The declaratory judgment differs only in that the court's direction can be given at an earlier stage, before the monetary claim has finally matured.

We dispute, in short, that the United States, in consenting to suit for money due under contracts and statutes, meant only to consent to a long-delayed and not to a prompt suit.

We do not wish to overstate the extent of the advantages which will accrue from the availability of declaratory relief under the Tucker Act. We expect, indeed, that it will markedly speed the course of justice only in a rather narrow

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[59] Cong. Globe, 37th Cong., 2d Sess., App. p. 2; *Glidden Company v. Zdanok*, 370 U.S. 530, 553 (1962); *Pocono Pines Hotel Co. v. United States*, 73 C.Cls. 447, 467 (1932).

[60] Senator Broadhead, 30 Cong. Globe, 33d Cong., 2d Sess., p. 71 (1854).

[61] H.Rpt. No. 1077, 49th Cong., 1st Sess., p. 4 (1886).

group of controversies. One reason is the express exemption in the Declaratory Judgment Act of disputes over taxes, 28 U.S.C. §2201, which alone represent 35 percent of the Court of Claims business. *Peartree, Statistical Analysis of the Court of Claims*, 55 Geo. L.J. 541, 549 (1967). A second reason is the settled requirement that the plaintiff must exhaust his administrative remedies before he files his petition in the Court of Claims. See, *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429-30 (1966); *United States v. Joseph A. Holpuch Co.*, 328 U.S. 234 (1946), as to suits under government contracts, which represent roughly 25 percent of the Court of Claims business, *Peartree, op. cit. supra*; and *Blackmar v. United States*, 173 Ct. Cl. 1035, 354 F.2d 340, 346-47 (1965); *Hutton v. United States*, 154 Ct.Cl. 34, 39 (1961); *McAulay v. United States*, 158 Ct.Cl. 359, 361, 305 F.2d 836, 838 (1962), as to civil and military pay cases, which combined represent the third largest category and roughly 15 percent of that Court's business. *Peartree, op. cit. supra.*

But there remains a small group of cases in which a long-delayed suit, deferred while a money claim slowly matures, is perilously close to the denial of any remedy. The maritime subsidy program which concerns *amicus curiae* is probably the most significant example (*supra*, pp. 1-5).

Another example, in many ways more striking, may be found in the facts of the *Twin Cities* case itself (81 C.Cls. at 656-657). The Post Office in 1923 entered into a 20 year lease of a building constructed for that lease; an earlier termination clause in the lease was as promised cancelled in 1923. The building was not suited for other tenancy and mortgages were issued on faith of the lease. The Post Office gave notice that it would cancel the lease and move out in March 1935, as a general Federal building would then be available. Plaintiff had a monetary claim, 8 years rental, if it could wait so long. It could bring suit, too, for the first month of unpaid rent but by that time the only tenant for whom the building was suitable would have moved out, and it would be left with a lawsuit, and possibly a mortgage

default, instead of economically valuable building. The case is a classic example of the versatile utility to the plaintiff of the declaratory judgment.

As it chances, *Twin Cities* is also a classic example of the utility of declaratory relief to the defendant. Twin Cities brought suit in the Court of Claims for rent for March-June 1935, and recovered judgment in 1938. *Twin Cities Properties, Inc. v. United States*, 87 C.Cls. 531 (1938). The Government then concluded that Twin Cities should have been required to deduct the cost of heat, light, etc. which it did not pay after the Post Office left. Upon its resulting refusal to pay further rent, Twin Cities accordingly brought its third suit, for rent from July 1935 through December 1938, and again recovered rent, though with a deduction of about 9% for the unfurnished services. *Twin Cities Properties, Inc. v. United States*, 90 C.Cls. 123 (1939).[62] The parties thus were reduced to four years of litigation, and the Government in effect required to pay double rent for 8 years, simply because the Court in 1935 cursorily accepted an ill-advised argument in behalf of the Government.[63]

We can, in sum, see no reason of policy nor any practical harm to the Government if monetary claims in the Court of Claims are subject to declaratory as well as money judgment relief. Our conclusion is given strong confirmation by the Solicitor General. The Court will recall that his first application (of August 30, 1968) for an extension of time within which to file its petition for writ of certiorari advanced as its sole ground:

> "It has been necessary to consult numerous federal agencies in order to determine the potential

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[62]There are no further reported cases, and we assume that the Government paid the remaining 5 years rent without the necessity of suit.

[63]The net rent awarded in the last decision was about $65,000 a month, suggesting that the aggregate cost to the Government of victory in the first case was about $6,000,000.

impact of this decision. Additional time is required to allow study of these views and, if it is decided to file a petition, to prepare and print it."

Judging by its brief, "the potential impact of this decition," as shown by consultation with "numerous federal agencies," is indeed negligible. It appears that the Court of Claims has suggested that two plaintiffs might amend their complaints to seek declaratory relief. One involves involuntary sick leave and the other widow's benefits as affected by a discharge alleged to be wrongful [Br. 18-19]. We doubt that the foundations of the republic are put in jeopardy if Government wrongs in these areas are open to remedy. The Government, in each of the three cases brought by members of *amicus curiae* which include a prayer for declaratory relief [Br. 19], has moved for summary judgment on the ground that the cause of action is nonjusticiable. If it is right, the suits are not saved by the declaratory prayer; if it is wrong, there is no discernible harm to anyone in being able to litigate a claim when it is fresh.

V

PETITIONER CANNOT AT THIS STAGE OF THE PROCEEDING QUESTION THE APPLICABILITY OF THE DECLARATORY JUDGMENT ACT TO THIS CASE

Amicus curiae has, of course, no interest in the outcome of this particular case. It has, however, the strongest sort of interest in ensuring that the law as to declaratory relief in Tucker Act litigation be settled promptly.[64] We feel,

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[64] In addition to the three suits by members of *amicus curiae* referred to by petitioner [Br. 19] a fourth is now pending (*Moore-McCormack Co. v. United States*, C.Cls. No. 143-68), from two to four more are about to be filed, and probably a dozen others will be filed within the year if the agency persists in its "lamentable administrative practices and procedures." (*American Mail Line v. Gulick*, CADC, Feb. 17, 1969, slip p. 14).

accordingly, that we may appropriately suggest that the applicability of the Declaratory Judgment Act to the particular facts of respondent's case should not be resolved at this stage of the proceeding.

Amicus curiae, as urged above, considers that the Court below has jurisdiction to enter a declaratory judgment only in respect of a monetary claim, one which if sustained will sooner or later call for payment of money by the United States. If that view were accepted, close analysis and further proof seem necessary before it can be determined whether respondent has presented a monetary claim.

The Solicitor General, we believe must necessarily agree. He chose to seek certiorari at an interlocutory stage of the proceeding, thus reserving subsidiary issues for subsequent decision below. He has presented as his only question for review the broad issue of the applicability of the Declaratory Judgment Act to the Court of Claims.

The Court will not ordinarily take under review questions not listed by petitioner as "presented." Rule 23(1)(c); see, *e.g., Irvine v. California*, 347 U.S. 128, 129 (1954); *Radio Officers Union v. Labor Board*, 347 U.S. 17, 37 (1954); *Lawn v. United States*, 355 U.S. 339, 362 (1958). This case fits into none of the recognized exceptions to this rule.[65]

This case represents, moreover, a remarkably poor occasion for the Court to reach out to decide questions not pre-

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[65] This is not a jurisdictional issue, as in *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956), as all parties agree the Declaratory Judgment Act does not affect jurisdiction (*supra*, pp. 12-13). This is not plain error, as in *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947), which infects a vital phase of the case. Nor does its resolution, as in *Boynton v. Virginia*, 364 U.S. 454, 457 (1960) permit the Court to avoid broad and difficult constitutional issues. The exception for an unrepresented petitioner, as in *Pollard v. United States*, 352 U.S. 354, 359 (1957), is obviously inapplicable.

sented, in that it is remarkably difficult to determine in the abstract whether or not the plaintiff presents a monetary claim.

The difficulties of this issue are rather like artichoke leaves; as one is peeled away it uncovers another. (a) The respondent seeks a declaration that he should have been retired in 1959 for disability rather than longevity. This would obviously present a monetary claim except that he is entitled to receive the same 75% of basic pay under either form of retirement [App. 13]. (b) A monetary foundation to his suit is introduced by IRC §104(a)(4) which exempts from income taxation a "pension * * * for personal injuries or sickness resulting from service in the armed forces." The difficulty here arises from the provision in 28 U.S.C. §2201 that declaratory relief is not available "with respect to Federal taxes." (c) One may agree with the court below that a suit is not one "with respect to Federal taxes" simply because the plaintiff has tax motives for a suit involving only his retirement rating and no issue whatever under the tax laws [App. 39-40]. (d) But if the only monetary claim were the expectation of a tax refund, one could argue against the availability of declaratory relief on the theory that no non-tax monetary claim was involved. (e) That doubt might be eased or eliminated if the prior reductions in retirement pay due to taxes were, pursuant to any declaratory judgment of the court below, to be repaid by the Army disbursing officers rather than the Treasury. This is probably the case; the brief in opposition indicates (pp. 4-5, n. 7) that taxes (possibly at a standard rate) are withheld before the retirement is paid and the relief sought is a declaration that petitioner should be paid as though his records were corrected (App. 42); See 10 U.S.C. §1552(c). It might or might not be relevant if the Army would be reimbursed by the Treasury for amounts erroneously withheld and paid over as tax. We believe both evidence and the detail of the governing regulations are necessary to answer this inquiry.

All of this seems to *amicus curiae* to be a thorny underbrush, inappropriate for decision at this stage of the pro-

ceeding. The issue has also a difficulty which considerably exceeds it importance, and is hardly the sort of complex inquiry which should engage the attention of this Court.

If the Court should agree with the analysis of *amicus curiae* that declaratory relief is available for monetary claims in the Court of Claims, that Court in the further proceedings which are necessary will be fully able to determine the applicability of that rule to the claim presented by the amended petition in this case. It will be noted that the court below has itself reserved the right ultimately to decline a declaration "if the circumstances as they are developed direct that course" [App. 39].

CONCLUSION

The Court should, for the reasons given above, hold that the Court of Claims is empowered to enter a declaratory judgment in respect of monetary claims within its subject-matter jurisdiction. The cause should then be remanded for further proceedings, including a determination whether respondent has here made such a claim.

Respectfully submitted,

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APPENDIX

PRIVATE ACTS PASSED BY THE CONGRESS AT THE SESSIONS PRECEDING THE FIRST COURT OF CLAIMS ACT AND THE TUCKER ACT

Thirty-Third Congress, First Session

The Congress passed 193 private bills in this session (10 Stat. 773-828) divided as follows:

Topic	Number of Acts	Chapter Numbers
Acts calling for money payments [no omnibus bills]	86	5,6,18-20,22,28,29,37, 45,51,52,55,57,58,65, 67,73,74,76-78,89,100, 112-116,118-124,126, 129,132-134,136-138, 140,143,145,147,149, 150,152,153,155,158 160,162-166,168,170, 173,176-184,186,187, 206,208-210,213,214, 233,235,238,252,255
Pensions	51	15,21,23,27,34,35,38-44,49,50,63,66,75,92-94,97,101,127,128,130, 139,142,148,151,157, 185,212,216,218-226, 232,234,241,257,261, 262,265,266
Land Titles	41	16,48 90,91,96,104,117, 125,131,135,141,144, 146,154,156,161,172, 174,175,190,205,207, 211,215,217,228,236, 237,239,240,250,251, 253,256,258-260,263, 264,275,276
Vessel registry	7	3,4,56,64,88,95,231
Incorporation	4	98,111,202,243
Railroad construction	3	197,229,272
Release from liability for official duties	1	171

Forty-ninth Congress, First Session

The Congress passed 754 private bills in this session (24 Stat. 653-880) divided as follows:

Topic	Number of Acts	Chapter Numbers
Pensions	650	2,10,24,25,36-39,44,45, 51-56,62,63,84-86,90, 325,358,364-380,382-90,398,399,401-415, 425-461,464-467,470-557,559,562-564,602-606,612-618,626-627, 633-635,639,641-754, 767-770,785,786,788-796,819-821,823-829, 851,852,854,856-892, 908-910,914-918,920
Acts calling for money payments [Nos. 12 and 359 omnibus bills; Nos. 591 and 919 references to C.Cls.; and No. 814 payment of C.Cls. judgment]	75	11,12,16-18,23,31-33, 35,43,46,77-79,336, 357,359,360,393,394, 400,419,420,462,468, 469,558,560,565,571, 586-594,596-598,607, 624,625,628-631,638, 766,777,783,787,813, 814,822,845,846,850, 853,855,904-907,911, 919,921-920,925,933, 934
Relief from political disabilities	14	1,13-15,34,42,65-66,68, 566,784,815,924,935
Release from liability for official duties	5	26,80,89,418,621
Patent of land	5	619,620,640,926,927
Grant or extension of patent	2	912,913
Franking privilege	1	561

Relief from taxes	1	595
Change of military records	1	896